IT IS SO ORDERED.

Guy R. Humphrey
United States Bankruptcy Judge

Dated: September 19, 2013

UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

In re: HG WORLDWIDE, INC., *Debtor*	Case No. 11-34369 Adv. No. 12-3079
RUTH A. SLONE, *Plaintiff* v. NANCY GOLDMAN, *Defendant*	Judge Humphrey Chapter 7

Determination of Bankruptcy Court Concerning Its Authority to Enter Final Judgment and Report to District Court Containing Proposed Findings of Fact and Conclusions of Law as to Defendant's Jury Demand and the Bankruptcy Court's Authority to Conduct a Jury Trial

I. Introduction

This matter is before the court on the filing of the Plaintiff, Ruth Slone, as the Chapter 7 Trustee of the bankruptcy estate of HG Worldwide, Inc. (the "Trustee" and "Worldwide"), seeking to strike the jury demand made by the defendant, Nancy Goldman ("Goldman") (doc. 27) and Goldman's response (doc. 31). The Trustee filed this adversary proceeding seeking to recover a preference from Goldman and to preserve any recovery for the benefit of the bankruptcy estate. *See* 11 U.S.C. §§ 547, 550 and 551. Goldman has not filed a proof of claim in Worldwide's bankruptcy case and has asserted a jury demand in the prayer for relief in her answer (doc. 3). The Trustee asserts that Goldman waived her right to a jury trial by including a request for attorney fees.

While both parties have consented to the bankruptcy court conducting a jury trial and have only addressed the waiver issue, this court is compelled to address related issues pertaining to this court's authority to enter final judgment and conduct a jury trial. Except for resolving these issues, this litigation is essentially ready for trial.[1]

Before the bankruptcy court can conduct a jury trial, the United States District Court for the Southern District of Ohio (the "District Court") must specially designate the bankruptcy court to do so. *See* 28 U.S.C. § 157(e) and Fed. R. Bankr. P. 9015(b). However, this court deems it prudent to address whether it has the constitutional authority to enter final judgment and to conduct a jury trial prior to any request of the parties to the District

[1] In order to address the issues discussed in this Determination and Report, on July 18, 2013, the court vacated an order scheduling the trial for August 27, 2013 (doc. 32). It also vacated dates for stipulations, witness lists, exhibit lists and copies of proposed exhibits and any pretrial motions. The discovery cut-off has passed.

Court for this court to conduct a jury trial. These issues may impact the parties' and potentially the District Court's adjudication of this proceeding.

For the reasons to be discussed, the court determines that it lacks the authority to enter judgment in this proceeding and, therefore, submits this report to the District Court with proposed conclusions of law. The Clerk will serve this Report and the parties may object to it. *See* Fed. R. Bankr. P. 9033. This court will proceed as directed by the District Court.

II. This Court Has a Duty to Initially Determine Whether It Has Authority to Enter Final Orders and Judgments

Pursuant to 28 U.S.C. § 157(b)(3), this court is to "determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11." The reason is that bankruptcy judges can only render final judgments in core proceedings (28 U.S.C. § 157(b)(1)) and are limited to proposed findings of fact and conclusions of law in non-core proceedings (28 U.S.C. § 157(c)(1)). Generally, the determination of whether a proceeding is a core or non-core proceeding is "left to the bankruptcy judge in the first instance." *Civic Center Cleaning Co. v. Reginella Corp.*, 140 B.R. 374 fn. 1 (W.D. Pa. 1992) (citing *Elmwood City Iron & Wire Co. v. Flakt, Inc. (In re Ellwood City Iron & Wire Co.)*, 51 B.R. 222 (W.D. Pa. 1985)). *See also Cooper v. Hewitt (In re 1733 Ridge Rd. East, Inc.)*, 125 B.R. 722 (W.D.N.Y. 1991) (bankruptcy court should make initial determination of whether proceeding is core or noncore).

In their Preliminary Pretrial Statements, the parties both stated that this proceeding is core. (docs. 6 & 7). Further, on January 29, 2013 this court issued its *Final Pretrial Order* and determined that the adversary proceeding is a core proceeding (doc. 20). The court's conclusion that this is a core proceeding is premised upon § 157(b)(2)(F)'s designation of "proceedings to determine, avoid, or recover preferences" as core proceedings.

However, even though this proceeding is statutorily defined by Congress to be a core proceeding, in light of the Supreme Court's decision in *Stern v.* Marshall, 131 S. Ct. 2594 (2011) and case law following *Stern*, the conclusion that this court may render final orders and judgment in this adversary proceeding pursuant to 28 U.S.C. § 157(b)(1) is in doubt. For the reasons which follow, this court concludes that under this recent case law, this court does not have the authority to render final judgment.

III. This Court Does Not Have the Authority to Enter Final Orders and Judgment in this Adversary Proceeding

A. Impact of *Stern v. Marshall; Katchen v. Landy*; *Granfinanciera v. Nordberg* and *Langenkamp v. Culp*

The Supreme Court's decision in *Stern v. Marshall* has altered federal courts' understanding of the authority which bankruptcy judges have to enter final judgments in certain proceedings.[2] A bankruptcy court's authority to enter final judgment in avoidance

[2] Part of the post-*Stern* debate in the federal courts is the breadth with which *Stern* should be applied. Some courts have focused on Chief Justice Roberts' emphasis in *Stern* that the issue being determined was a narrow one that should not result in significant change to the adjudication of bankruptcy cases. *See Stern*, 131 S. Ct. at 2620 ("the question presented here is a 'narrow' one" and "Congress, in one isolated respect, exceeded" its authority). The following are some of the cases which follows this language in *Stern*: *Quigley Co. v. Law Offices of Angelos (In re Quigley Co.)*, 676 F.3d 45, 52 (2nd Cir. 2012); *Mason v. Ivey*, 2013 U.S. Dist. LEXIS 120031 at *15-16 (M.D.N.C. Aug. 23, 2013); and *Walker, Truesdell, Roth & Assocs. v. Blackstone Group*, L.P. (*In re Extended Stay, Inc.*), 466 B.R. 188, 202 (S.D.N.Y. 2011) ("Requiring withdrawal of [fraudulent conveyance and preference] actions would be contrary to the language of *Stern*, which categorizes itself as a 'narrow' decision that does not 'meaningfully change[] the division of labor' between bankruptcy courts and district courts. Indeed, courts

actions, including preferential transfer actions, is in question. Prior to the release of the *Stern* decision, bankruptcy courts routinely adjudicated fraudulent conveyance and preference claims (commonly referred to as avoidance claims) through final judgment based upon those proceedings having been designated by Congress as core proceedings pursuant to 28 U.S.C. § 157(b)(2)(F) and (H). However, *Stern*'s analysis casts doubt on this court's ability to enter judgment on avoidance claims.

In *Stern* the Court held that, despite Congress' designation in 28 U.S.C. § 157(b)(2)(C) of counterclaims against persons filing claims against the estate as core proceedings, the bankruptcy court did not have the constitutional authority to enter final judgments in such a proceeding when resolution of the creditor's proof of claim did not resolve the debtor's counterclaim. The Court determined that Congress' grant of that authority to bankruptcy courts under such circumstances violates Article III of the United States Constitution because bankruptcy courts do not have authority to enter final judgments over "the stuff of the traditional actions at common law tried by the courts at Westminster in 1789," which powers are reserved to Article III judges who have lifetime appointments with compensation which cannot be diminished. *Stern*, 131 S. Ct. at 2609 (quoting *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 90 (1982) (Rehnquist, J.,

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considering *Stern* have declined to give it the expansive scope that plaintiffs request."; footnotes omitted). These courts generally limit the application of the Article III separation of powers principles to the counterclaims involved in *Stern* and described by 28 U.S.C. § 157(b)(2)(C). *See First Choice Drywall, Inc. v. Presbitero* (*In re First Choice Drywall, Inc.*), 2012 WL 4471570, at *2-3 (Bankr. N.D. Ill. Sept. 25, 2012). Other courts have concluded that separation of powers principles must be applied more broadly to other claims described as core proceedings under § 157(b)(2), including to fraudulent conveyance and preferential transfer claims described by § 157(b)(2)(F) and (H). *See Investor Prot. Corp. v. Bernard L. Madoff Inv. Securities LLC (In re Madoff Securities)*, 490 B.R. 46, 51 n. 2(S.D.N.Y. 2013) (" . . . dictum cannot trump the Court's holding that the state-law counterclaim at issue, '*like the fraudulent conveyance claim at issue in Granfinanciera* [, did] not fall within any of the varied formulations of the public rights exception in this Court's cases.' ").

concurring)). In addition to *Marathon*, the Court relied upon three earlier Supreme Court decisions in deciding *Stern*: *Katchen v. Landy*, 382 U.S. 323 (1966); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989); and *Langenkamp v. Culp*, 498 U.S. 42 (1990).

In *Katchen*, the Court determined that a bankruptcy referee could exercise "summary jurisdiction" over a preference claim pursued by a bankruptcy trustee against a creditor who had filed a proof of claim in the bankruptcy proceeding. The Court determined that even though a preference could possibly constitute a "plenary suit" in an Article III court, the bankruptcy court could adjudicate the preference claim because it was not possible to resolve the creditor's proof of claim without resolving the voidable preference claim. The plenary proceeding could be adjudicated in the bankruptcy court because "the same issue [arose] as part of the process of allowance and disallowance of claims." *Katchen*, 382 U.S. at 336.

In *Granfinanciera* the Court determined that corporations were entitled to a jury trial under the Seventh Amendment in a fraudulent conveyance proceeding because a fraudulent conveyance claim constituted what would have been an "action at law" under English common law and determination of such claims involves private and not public rights. Although the matter arose from a bankruptcy case, the Court declined to decide whether a bankruptcy court could conduct a jury trial since the issue was not presented.

Finally, in *Langenkamp,* the Court determined that creditors who have filed proofs of claim in a bankruptcy court are not entitled to a jury trial under the Seventh Amendment on preference claims because in filing proofs of claim the creditors subject themselves to bankruptcy court's equity jurisdiction. The court expressly stated that "a creditor's right to a

jury trial on a bankruptcy trustee's preference claim depends upon whether the creditor has submitted a claim against the estate." *Langenkamp*, 498 U.S. at 45 (quoting *Granfinanciera*, 492 U.S. at 58).

B. *Waldman v. Stone* and *Onkyo Corp. v. Global Technovations Inc.*

The Sixth Circuit has had occasion to construe *Stern* twice – first in *Onkyo Europe Electronics GMBH v. Global Technovations Inc. (In re Global Technovations Inc.)*, 694 F.3d 705 (6th Cir. 2012) and second in *Waldman v. Stone*, 698 F.3d 910 (6th Cir. 2012). In *Onkyo* the Sixth Circuit held that the bankruptcy court could enter final judgment on a fraudulent conveyance claim when the defendant had filed a proof of claim. *Onkyo*, 694 F.3d at 722. However, in *Waldman*, the Court held that while the bankruptcy court had the authority to enter final judgment on a secured creditor's claims against the debtor, even if the secured creditor need not and did not file a proof of claim, the bankruptcy could not render a final judgment on the debtor's affirmative state law fraud claim against the creditor because resolution of the creditor's claims against the debtor would not "necessarily resolve [the debtor's] affirmative claims." *Waldman*, 648 F.3d at 918, 921.

Of special significance within the Sixth Circuit is that in *Waldman* the decision determined that a party to an adversary proceeding cannot waive its right to determination of a plenary action by an Article III court. ("Waldman's objection thus implicates not only his personal rights, but also the structural principle advanced by Article III. And that principle is not Waldman's to waive."). *Waldman*, 648 F.3d at 918 (citing *Spierer v. Federated Dep't Stores, Inc.* (*In re Federated Dep't Stores, Inc.*), 328 F.3d 829, 833 (6th Cir. 2003)). While *Waldman* expressed the issue in terms of whether Stone could waive the structural

principles of Article III, authorities construe *Waldman* as rejecting parties' ability to consent to a bankruptcy court's entering of final orders and judgments if they do not otherwise have the constitutional authority Therefore, within the Sixth Circuit, if the bankruptcy courts do not have that authority, it appears that the bankruptcy courts must render proposed findings of fact and conclusions of law for final determination by the district court even if the parties consent otherwise. The Seventh Circuit recently joined the Sixth Circuit in finding that a party's right to final determination of a proceeding by an Article III court cannot be waived. *Wellness Int'l Network v. Sharif,* _ F.3d _, 2013 WL 4491926 (7th Cir. Aug. 21, 2013). This waiver and consent issue, along with the issue of whether bankruptcy courts may propose findings of fact and conclusions of law in core proceedings for which they are determined to lack authority to enter final judgment[3] is presently before the Supreme Court. *Exec. Benefits Ins. Agency v. Arkison* (*In re Bellingham Ins. Agency*), 702 F.3d 553 (9th Cir. 2012), *cert. granted* 133 S. Ct. 2880 (2013).[4]

[3] 28 U.S.C. § 157(c)(1) only explicitly provides the bankruptcy courts with authority to render proposed findings of fact and conclusions of law in matters that are determined to be non-core. *See* 28 U.S.C. § 157(b)(2) and (c)(1). There is uncertainty with respect to this new category of proceedings which have been statutorily defined by Congress as being core under 28 U.S.C. § 157(b)(2), but for which bankruptcy courts lack authority to enter final judgment. *See Waldman*, 698 F.3d at 921 (raising the issue in dicta) and *Bellingham*, 702 F.3d at 566 (concluding bankruptcy courts have authority to propose findings of fact and conclusions of law). *See also Heller Ehrman LLP v. Arnold & Porter, LLP* (*In re Heller Ehrman*), 464 B.R. 348, 355-56 (N.D. Cal. 2011) (concluding that most courts have determined that *Stern* allows bankruptcy courts to submit proposed findings of fact and conclusions of law when Congress has defined the proceeding as "core" and constitutionally the bankruptcy courts lack the authority to enter final judgment).

[4] In *Bellingham* the Ninth Circuit concluded that parties could consent to bankruptcy courts entering of final judgments in fraudulent conveyance proceedings despite bankruptcy courts not having the constitutional authority to do so. *Bellingham*, 702 F.3d at 572-73 ("Fraudulent conveyance claims are 'quintessentially suits at common law' designed to 'augment the bankruptcy estate.' *Granfinanciera*, 492 U.S. at 56. Thus, Article III bars bankruptcy courts from entering final judgments in such actions brought by a noncreditor absent the parties' consent. But here [the defendant] consented to the bankruptcy court's jurisdiction, rendering that court's entry of summary judgment in favor of the Trustee constitutionally sound."). *See also High Performance Real Estate, Inc. v. Riley,* 2013 U.S. Dist. LEXIS 89127 at *6-7 (D. Colo. June 25, 2013) (finding no constitutional issue to determine because both parties consented to the bankruptcy court's authority to enter orders and judgment)

C. Because Preference Proceedings have been Determined to Be Actions at Law or Plenary in Nature when the Defendant Has Not Filed a Proof of Claim, this Court Does Not Have the Authority to Enter Final Orders and Judgment in this Proceeding

While the case law appears trending in the direction of finding that bankruptcy courts lack authority to enter final judgment as to fraudulent conveyance claims, the case law is less clear as to bankruptcy courts' authority to enter final judgment on preference claims. Upon final analysis, the court concludes that when the preference defendant has not filed a proof of claim in the bankruptcy case, a bankruptcy court does not have the authority to enter final judgment.

The Court's decisions, including *Stern v. Marshall*, do not provide clear guidance on this issue. Statements in its decisions can be construed both to support bankruptcy courts' authority to enter final judgment on preference claims and to oppose such authority. The following statement in *Stern* seems to support such authority:

> In both *Katchen* and *Langenkamp*, moreover, the trustee bringing the preference action was asserting a right of recovery created by federal bankruptcy law. In *Langenkamp*, we noted that "the trustee instituted adversary proceedings under 11 U.S.C. § 547(b) to recover, as avoidable preferences," payments respondents received from the debtor before the bankruptcy filings. In *Katchen*, "[t]he Trustee . . . [asserted] that the payments made [to the creditor] were preferences inhibited by Section 60a of the Bankruptcy Act." Vickie's claim, in contrast, is in no way derived from or dependent upon bankruptcy law; it is a state tort action that exists without regard to any bankruptcy proceeding.

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and *Lehman Bros. Holdings, Inc. v. JPMorgan Chase Bank, N.A.* (*In re Lehman Bros. Holdings Inc.*), 480 B.R. 179, 197 (S.D.N.Y. 2012) (parties may consent to final adjudication by a bankruptcy judge even though the bankruptcy court does not otherwise have that authority).

Stern, 131 S. Ct. at 2618 (internal citations omitted). A preference claim under § 547 is a right of recovery created by federal bankruptcy law. The court noted that:

> A voidable preference claim asserts that a debtor made a payment to a particular creditor in anticipation of bankruptcy, to in effect increase that creditor's proportionate share of the estate. The preferred creditor's claim in bankruptcy can be disallowed as a result of the preference, and the amounts paid to that creditor can be recovered by the trustee.

Id. at 2616. This statement recognizes that with preference claims there is a nexus between bankruptcy and the claims allowance process and, thus, why a preference claim could very well be deemed to be an equitable action as opposed to a plenary action.

On the other hand, the following statement in *Stern* seems to oppose the bankruptcy courts having authority to enter final orders or judgment on preference claims:

> Our *per curiam* opinion in *Langenkamp* is to the same effect. We explained there that a preferential transfer claim can be heard in bankruptcy when the allegedly favored creditor has filed a claim, because *then* "the ensuing preference action by the trustee become[s] integral to the restructuring of the debtor-creditor relationship." If, in contrast, the creditor has not filed a proof of claim, the trustee's preference action does not "become[ ] part of the claims-allowance process" subject to resolution by the bankruptcy court.

Id. at 2617 (internal citations omitted).

The "hybrid" nature of preference claims, having both attributes of actions at law (plenary proceedings) and equitable actions (summary proceedings), is highlighted by the following statement in the *Stern* decision:

> We see no reason to treat Vickie's counterclaim any differently from the fraudulent conveyance action in *Granfinanciera*. *Granfinanciera's* distinction between actions that seek "to augment the bankruptcy estate" and those that seek "a pro rata share of the bankruptcy res," reaffirms that Congress may

> not bypass Article III simply because a proceeding may have *some* bearing on a bankruptcy case; the question is whether the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process.

Id. at 2618 (internal citations omitted). A preference claim under § 547 both augments the bankruptcy estate (in the nature of an action at law) and brings property back into the estate so that the res may be distributed proportionately among all of the debtor's creditors, with even the preference defendant being able to participate in any such distributions to the extent the defendant pays funds to the trustee (thus in the nature of an action in equity).[5] *See also* *Mason v. Ivey*, 2013 U.S. Dist. LEXIS 120031 at *20-21 (M.D.N.C. Aug. 23, 2013) (discussing the close nexus between avoidance proceedings and a bankruptcy court's determination of claims against the bankruptcy estate).[6]

Neither the Sixth Circuit's decision in *Waldman* nor its decision in *Global Technovations* involved a preference claim. *See Waldman*, 648 F.3d at 919 and *Global Technovations*, 694 F.3d at 722. Thus, there is no governing decision from the Sixth Circuit as

[5] If a bankruptcy trustee recovers from the preference defendant, the defendant will be entitled to file a claim in the case to the extent of the funds paid over to the trustee pursuant to § 502(h). *See* 11 U.S.C. § 502(d) and (h); *Fleet National Bank v. Gray* (*In re Bankvest Capital Corp.*), 375 F.3d 51, 66-67 (1st Cir. 2004) and *County of Sacramento v. Hackney* (*In re Hackney*), 93 B.R. 213, 216 (Bankr. N.D. Cal. 1988). Accordingly, a preference claim cannot be said to be completely separate from the claims resolution process – even if the defendant does not initially file a proof of claim.

[6] Judge Isgur focused on this nexus in concluding in *West v. Freedom Medical, Inc.* (*In re Apex Long Term Acute Care-Katy, L.P.*), 465 B.R. 452 (Bankr. S.D. Tex. 2011) that bankruptcy judges have the authority to enter final orders and judgment in preference adversary proceedings. Relying on *Cent. Va. Cmty. College v. Katz*, 546 U.S. 356 (2006), which determined that the States are not immune from preference liability and emphasized that bankruptcy court jurisdiction is principally in rem, he concluded that "the resolution of certain fundamental bankruptcy issues fall within the public rights doctrine" and that preference proceedings fall within that group of issues. *Freedom Medical*, 465 B.R. at 458. His conclusion is largely premised upon the notion that preference proceedings are in rem adjudications resulting in the equality of distribution among creditors and that Congress has essentially defined preferentially transferred property as property of the bankruptcy estate and has made preference defendants creditors of the bankruptcy estate, all which he contends is within Congress' constitutional authority.

to whether a bankruptcy court has authority to enter final judgment in preference proceedings when the defendant has not filed a proof of claim in the bankruptcy case.

Given the binding precedent which holds that a preference claim is an action at law absent the preference defendant having filed a proof of claim, this court determines that it does not have authority to enter final judgment in this proceeding. First, precedent establishes that, absent the filing of a proof of claim by the preference defendant, a preference cause of action under § 547 is an action of law for which the Seventh Amendment right to a jury trial attaches. *See Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 64, 64 (1989); *Schoenthal v. Irving Trust Co.*, 287 U.S. 92, 95 (1932); and *Black v. Boyd*, 248 F.2d 156, 162 (6th Cir. 1957). *See also Crescent Res. Litig. Trust v. Duke Energy Corp.*, 2013 U.S. Dist. LEXIS 62676 at *11 (W.D. Tex. May 2, 2013) ("Preferential or fraudulent transfer actions are considered suits at common law." (citation omitted)). Thus, in construing *Granfinanciera*, the Court in *Langenkamp* stated that: "If a party does not submit a claim against the bankruptcy estate, however, the trustee can recover allegedly preferential transfers only by filing what amounts to a legal action to recover a monetary transfer. In those circumstances the preference defendant is entitled to a jury trial." *Langenkamp*, 498 U.S. at 45.

The Court has not expressly equated its Seventh Amendment jury trial right jurisprudence with its Article III separation of powers jurisprudence defining when parties are entitled to a final decision by an Article III court. However, in relying upon *Langenkamp* and *Granfinanciera* in its *Stern* decision, both of which were Seventh Amendment cases, the court relied upon its Seventh Amendment jurisprudence and linked it to the Article III separation of powers issue in *Stern*. Thus, some authorities believe that the Supreme Court

was signaling that the circumstances giving rise to entitlement to a jury trial under the Seventh Amendment are the same as those entitling a party to a final determination by an Article III district court. See *Waldman*, 648 F.3d at 920 ("*Granfinanciera* also explains why the bankruptcy court's judgment on Stone's disallowance claims was consistent with the Seventh Amendment."). *See also Penson Fin. Servs. v. O'Connell* (*In re Arbco Capital Mgmt., LLP*), 479 B.R. 254, 266 (S.D.N.Y. 2012) ("Since a preference defendant is entitled to a jury trial before an Article III court where it has not filed a proof of claim against the bankruptcy estate, it follows that the preference defendant is entitled to have its claim finally adjudicated by an Article III judge."); *Heller Ehrman LLP v. Arnold & Porter, LLP* (*In re Heller Ehrman LLP*), 464 B.R. 348, 354 (N.D. Cal. 2011) ("Thus, *Stern* specifically linked the public rights exception in the Seventh Amendment context from *Granfinanciera* to the question of whether an Article I bankruptcy court had authority to enter a final judgment on a claim, finding a determination in one context dispositive of the other context as well."); and *Lain v. Erickson* (*In re Erickson Ret. Communities, LLC*), 2012 U.S. Dist. LEXIS 76562 at *11-12 (D. Md. June 1, 2012) ("the right to a jury trial is determinative of whether Article III judges must adjudicate a proceeding"). Entitlement to a jury trial under the Seventh Amendment appears to mandate final determinations by an Article III court. Since Court jurisprudence mandates that a defendant to a preference action who has not filed a proof of claim is entitled to a jury trial, that entitlement to a jury trial indicates that the proceeding is one for which bankruptcy judges lack the authority to enter final judgment. Finally, subsequent to the issuance of *Stern*, district courts have held that absent the filing of a proof of claim or consent of the parties to the entering of final orders by the bankruptcy court, bankruptcy

courts do not have the authority to enter final judgment in preference adversary proceedings.[7] *See In re Innovative Commun. Corp.*, 2013 U.S. Dist. LEXIS 82336, at *14 (D.V.I. June 12, 2013) (fraudulent transfer and preferential transfer claims against non-creditors may be decided only by the district court, absent waiver or consent by the parties); and *Arbco Capital Mgmt.*, 479 B.R. at 266 (similar); *Nisselson v. Salim*, 2013 U.S. Dist. LEXIS 42556, at *3-4 (S.D.N.Y. March 25, 2013) (citing *Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, 490 B.R. 46, 49 (S.D.N.Y. Jan. 4, 2013) (finding an emerging consensus in the Southern District of New York that avoidance claims concern private rights and must be finally determined by an Article III court). *See also Kramer v. Mahia*, 2013 U.S. Dist. LEXIS 55728 at *12-13 (S.D.N.Y. April 15, 2013) (fraudulent conveyance action does not fall under the public rights exception). *But see Appalachian Fuels, LLC v. Energy Coal Resources, Inc.* (*In re Appalachian Fuels, LLC*), 472 B.R. 731, 744 (E.D. Ky. 2012) (refusing to apply *Stern* to fraudulent conveyance and preference claims).[8]

IV. Procedure in the Event Bankruptcy Court Lacks Authority to Enter Final Judgment or to Conduct the Jury Trial

Procedural and administrative issues arise when a bankruptcy court is determined not to be able to enter final judgment or to conduct a jury trial in an adversary proceeding.

[7] As noted previously, in the Sixth Circuit consent of the parties would not be sufficient to permit bankruptcy courts to enter final judgment if the bankruptcy court does not have the authority to enter final judgment under Article III. *See Waldman*, 698 F.3d at 918.

[8] Some bankruptcy courts also have concluded post-*Stern* that they have the constitutional authority to enter final orders in preference proceedings. *See In re Cent. La. Grain Coop., Inc.*, 2013 Bankr. LEXIS 3356 at *2 (Bankr. W.D. La. Aug. 7, 2013); *First Choice Drywall, Inc. v. Presbitero* (I*n re First Choice Drywall, Inc.*), 2012 Bankr. LEXIS 4664, at *5-6 (Bankr. N.D. Ill. Sept. 25, 2012); *Zazzali v. 1031 Exchange Group (In re DBSI, Inc.)*, 467 B.R. 767, 773 (Bankr. D. Del. 2012); and *West v. Freedom Medical, Inc.* (*In re Apex Long Term Acute Care-Katy, L.P.*), 465 B.R. 452, 468 (Bankr. S.D. Tex. 2011).

How should this adversary proceeding be administered in the event it is determined that this court does not have the authority to enter final judgment or to conduct a jury trial? The United States Code, Bankruptcy Rules, and case law provide guidance, but in large part it is dependent upon the discretion of the District Court.

First, when a proceeding is determined to be non-core, § 157(c) provides that:

> (1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.
>
> (2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

Several points can be distilled from these provisions. First, a bankruptcy judge *may* adjudicate non-core proceedings through the entering of proposed findings of fact and conclusions of law for consideration by the district court. *See* § 28 U.S.C. 157(c)(1). However, the district court may choose to withdraw the reference to the bankruptcy court under such circumstances on its motion or on the motion of any party pursuant to 28 U.S.C. § 157(d). In addition, when a proceeding is non-core, upon consent of all of the parties to the proceeding, the district court may refer the proceeding to the bankruptcy court for it to render final orders and judgment, with the parties retaining their right to appeal those final orders and judgment pursuant to 28 U.S.C. § 158. *See* § 157(c)(2) and *Dietz v. Spangenberg,*

2013 U.S. Dist. LEXIS 32268 at *12 (D. Minn. March 8, 2013). Thus, for proceedings that do not fall into the "core" matters described under 28 U.S.C. § 157(b)(2), § 157(c) provides that the bankruptcy court may either enter proposed findings of fact and conclusions of law, or with the consent of all the parties and referral by the district court, may enter final orders and judgment on such matters.

As noted earlier, an issue has arisen as to whether bankruptcy courts may render proposed findings of fact and conclusions of law in proceedings that are described by § 157(b)(2) as being "core," but beyond this court's authority. This issue arises because § 157(c)(1) only authorizes bankruptcy judges to render proposed findings and conclusions as to a proceeding that is not a "core proceeding" as defined by § 157(b)(2), but not necessarily as to a proceeding that is defined as "core" under that provision, but for which the bankruptcy court may not constitutionally enter final orders and judgment. *See Waldman*, 698 F.3d at 921-22. Most courts have concluded that bankruptcy courts may enter proposed findings of fact and conclusions of law under those circumstances. *See Dang v. Bank of Am. N.A.*, 2013 U.S. Dist. LEXIS 54833 at *39 (D. Md. April 17, 2013) and cases cited therein and *Kirschner v. Agoglia*, 476 B.R. 75, 82 (S.D.N.Y. 2012) (citations omitted) ("This Court, however, in line with most other district and bankruptcy courts, concludes that a bankruptcy court does have the power (statutory and otherwise) to issue a report and recommendation on such claims"). The Sixth Circuit in *Waldman* raised the issue in dicta. *Waldman*, 698 F.3d at 922 ("Of course, one might argue that--- in core proceedings as to which Article bars the bankruptcy courts from entering judgment—Congress's grant of the greater power to enter final judgment implies a lesser authority to propose them.").

Subsequent to *Stern*, some district courts have withdrawn the reference to the bankruptcy court when a determination was made that the bankruptcy court lacked authority to enter final orders and judgment in the proceeding. *See Lain v. Erickson* (*In re Erickson Ret. Communities, LLC*), 2012 U.S. Dist. LEXIS 76562 (D. Md. June 1, 2012) (finding that no factor favored the bankruptcy court's adjudication of the proceeding); *Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Secs. LLC*, 486 B.R. 579 (S.D.N.Y. 2013) ("plethora of 'other factors' " militated in favor of withdrawing the reference). In addition, it has been held that when a party is entitled to a jury trial, cause automatically exists to withdraw the reference. *Caudill v. Burrows* (*In re Oasis Corp.*), 2008 WL 2473496, at *2 (S.D. Ohio June 18, 2008); *Sergent v. McKinstry*, 472 B.R. 387, 420 (E.D. Ky. 2012) and *Gertz v. Twin City Fire Ins. Co.* (*In re Infotopia, Inc.*), 2007 U.S. Dist. LEXIS 74087, at *7-8 (N.D. Ohio Sept. 26, 2007).

In ruling on motions to withdraw the reference relating to the final authority issue raised by *Stern*, courts have generally applied the *Orion*[9] permissive withdrawal factors, which are:

> (1) whether the proceeding is core or non-core;
> (2) the uniform administration of bankruptcy proceedings;
> (3) expediting the bankruptcy process and promoting judicial economy;
> (4) the efficient use of the resources of debtors and creditors;
> (5) reduction in forum shopping; and
> (6) the preservation of a right to a trial by jury (or likelihood of a jury trial).

Mason v. Ivey, 2013 U.S. Dist. LEXIS 120031 at *26 (M.D.N.C. August 23, 2013) (finding that because the defendants filed proofs of claim, the trustee's fraudulent conveyance claims were core and withdrawal of the reference was not appropriate). *See also* 28 U.S.C.

[9] *Orion Pictures Corp. v. Showtime Networks, Inc. (In re Orion Pictures Corp.)*, 4 F.3d 1095, 1101 (2nd Cir. 1993).

§ 157(d) and A*ntioch Company Litigation Trust v. Morgan,* 2012 U.S. Dist. LEXIS 164867 (S.D. Ohio Nov. 19, 2012). In these proceedings the courts add to the *Orion* factors by asking whether the bankruptcy court has authority to enter final judgment. *See Bernard L. Madoff Inv. Secs. LLC*, 486 B.R. at 582 n. 1 ("The Court notes that, following the Supreme Court's decision in *Stern v. Marshall . . .* the majority of courts in this Circuit have determined that the primary *Orion* factor - whether or not a proceeding is core or non-core - has been supplanted by a determination 'of whether the bankruptcy court may finally determine a proceeding or whether the bankruptcy court's proposals must be reviewed de novo by a district court is governed by Article III.' ").

In a number of proceedings for which the bankruptcy court was found not to have constitutional authority to enter final judgment, district courts have chosen to have bankruptcy courts continue administering the proceeding until the proceeding was ready for trial, with the district court only withdrawing the reference for purposes of conducting the trial. *See Lehman Bros. Holdings, Inc. v. JPMorgan Chase Bank, N.A.* (*In re Lehman Bros. Holdings Inc.*.), 480 B.R. 179, 197 (S.D.N.Y. 2012); *Dietz v. Spangenberg,* 2013 U.S. Dist. LEXIS 32268 (D. Minn. March 8, 2013) (transfer to district court was premature and proceeding was remanded to bankruptcy court until it was trial ready); and *Lewis v. Da Nam Ko* (*In re Richardson*), 2012 U.S. Dist. LEXIS 160348 (D. Colo. Nov. 8, 2012) and *In re Calvert*, 2013 U.S. Dist. LEXIS 96432 (W.D. Wash. March 5, 2013) (reference withdrawn, but proceeding remanded to the bankruptcy court to determine all pretrial issues). In a thorough analysis, a district court withheld withdrawing the reference, noting with respect to the defendants' jury demand:

> Defendants argue that their demand for a trial by jury makes withdrawal mandatory pursuant to *Stern*, since when such a demand is made, it must be met at all stages of the proceedings . . . This argument is unavailing. "A motion for withdrawal of the reference will not be granted simply because of a party's demand for a jury trial[,] without consideration of how far the litigation has progressed[,] because such decision would run counter to the court's interest in judicial economy." *In re Extended Stay*, 466 B.R. at 198, 206 (holding that, notwithstanding jury demand, "withdrawing the reference is premature where discovery has not commenced and plaintiffs have not yet survived a motion to dismiss"); *see also Kirschner*, 476 B.R. at 83 [*25] ("While Movants cite to their jury demand as a reason to withdraw the reference now, the Court may withdraw the reference if and when a trial is necessary . . . ."); *In re Enron Corp.*, No. 04 Civ. 7950(NRB), 2005 U.S. Dist. LEXIS 2132, 2005 WL 356856, at *5 (S.D.N.Y. Feb. 15, 2005) ("[C]ourts often find it appropriate to defer withdrawing the reference until a case is trial ready.") (internal quotation omitted). Accordingly, even assuming that Defendants have made a valid demand for a jury trial — a matter which should have been brought before the Bankruptcy Court — withdrawal of the reference is not yet required or appropriate.

Nisselson v. Salim, 2013 U.S. Dist. LEXIS 42556 (S.D.N.Y. March 25, 2013).

Yet in other proceedings the district courts have refused to withdraw the reference when the bankruptcy court was found to lack authority to enter final orders and judgment, instructing the bankruptcy courts to render proposed findings of fact and conclusions of law for its review and final determination. Thus, in the *Madoff* case Judge Rakoff stated:

> In sum, the Court follows other courts in this District, as well as its own prior precedent, in concluding that, although *Stern* precludes the Bankruptcy Court from finally deciding avoidance actions (unless, possibly, the Trustee has sought to disallow a claim to the estate under § 502(d)), the Bankruptcy Court nonetheless has the power to hear the matter in the first instance and recommend proposed findings of fact and conclusions of law. The Court further declines to withdraw the reference of these cases to the Bankruptcy Court "for cause

> shown" before the Bankruptcy Court has issued appropriate findings of fact and conclusions of law.

Bernard L. Madoff Inv. Sec. LLC, 490 B.R. at 58.

V. Proposed Conclusion of Law, or in the Alternative, Conclusion of Law: Goldman Has Not Waived Her Right to a Jury Trial[10]

The Trustee argues that Goldman has waived her right to a jury trial by including a request for attorney fees in her prayer for relief contained in her answer to the Trustee's Complaint. *See* doc. 3. The court concludes that this request for attorney fees in Goldman's answer does not constitute a waiver of Goldman's right to a jury trial. Because the court also concludes that it does not have the authority to enter final orders or judgment in this adversary proceeding, the court submits this conclusion to the District Court as a proposed conclusion of law for the District Court's final determination pursuant to 28 U.S.C. § 157(c)(1).[11]

Because the entitlement to a jury trial is a fundamental constitutional right, courts engage in every reasonable presumption against the waiver of that right. *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937). *See also Crescent Res. Litig. Trust v. Duke Energy Corp.*, 2013 U.S. Dist. LEXIS 62676, at *26 (W.D. Tex. May 2, 2013) ("the relevant legal standard [for

[10] The court submits its determination as to the jury trial waiver issue as a proposed conclusion of law for final determination by the District Court in the event the District Court agrees that the bankruptcy court does not have the authority to render a final judgment. However, in the event the District Court determines this court does have authority to enter final orders and judgment, this determination shall constitute the bankruptcy court's conclusion of law.

[11] Given that this court has concluded that it does not have authority to enter final orders or judgment in this proceeding, one might ask whether this court should opine on the issue of the jury trial waiver. There is precedent that this court should make that determination on an initial basis, but subject to a final determination of the District Court. *See Nisselson v. Salim*, 2013 U.S. Dist. LEXIS 42556 at *25 (S.D.N.Y. March 25, 2013) (issue of whether defendants made valid jury demand should have first been raised before the bankruptcy court).

determining whether a party has waived its right to a jury trial] is the voluntary and knowing standard, viewed through a presumption against waiver."). It is within this framework that the court considers the Trustee's argument that Goldman waived her entitlement to a jury trial.

In essence, the Trustee's argument that Goldman waived her right to a jury trial is premised upon the notion that the request for attorney fees in the prayer for relief constitutes a "claim" against the bankruptcy estate. The Trustee is correct that it is well-established that the submission of a claim in a bankruptcy case invokes the equitable jurisdiction of a bankruptcy court, that matters within the equity jurisdiction of courts are to be tried without a jury, and when creditors have filed proofs of claim and an adversary proceeding is filed against that creditor seeking to avoid a fraudulent conveyance or a preferential transfer, the courts have routinely held that the creditor has waived the right to a jury trial. Thus, in *Langenkamp*, the Court determined that creditors who have filed proofs of claim are not entitled to a jury trial under the Seventh Amendment on preference claims because in filing proofs of claim the creditors subject themselves to the bankruptcy court's equity jurisdiction. *See also Katchen v. Landy*, 382 U.S. 323 (1966) (the Court determined that a bankruptcy referee could exercise "summary jurisdiction" over a preference claim pursued by a bankruptcy trustee against a creditor who had filed a proof of claim in the bankruptcy proceeding. Although a preference could possibly constitute a "plenary suit" in an Article III court, the bankruptcy court could adjudicate the preference claim because it was not possible to resolve the creditor's proof of claim without resolving the voidable preference

claim).[12] One court has referred to the Supreme Court's holdings in *Langenkamp, Katchen and Granfinanciera* as the "Trilogy Holding" – standing for the proposition that if a creditor voluntarily files a claim against the bankruptcy estate, that party loses its Seventh Amendment right to a jury trial in a later action filed by the bankruptcy trustee. *William M. Condrey, P.C. v. Endeavor Highrise, L.P.* (*In re Endeavor Highrise*), 425 B.R. 402, 407-08 (Bankr. S.D. Tex. 2010). *See also Pearson Educ., Inc. v. Almgren,* 685 F.3d 691, 695 (8th Cir. 2012) (The rationale of *Langenkamp* is not limited to preference actions; any defendant to an adversary proceeding who has filed a proof of claim in the debtor's bankruptcy case waives its right to a jury trial if the resolution of the adversary proceeding "affects the equitable restructuring of debtor-creditor or creditor-creditor relations.").

Does the request for attorney fees and costs in the "wherefore" clause of an answer waive the right to a jury for a defendant who has not filed a proof of claim or plead a counterclaim? One bankruptcy court has held that a counterclaim filed by a defendant to an adversary proceeding filed by a Chapter 7 trustee that does not implicate the claims resolution process or the restructuring of the debtor-creditor relationship, along with a request for attorney fees, is not the "functional equivalent of a proof of claim" and, therefore, the filing and prosecution of such a counterclaim does not constitute a waiver of the defendant's right to a jury trial. *In re British American Properties III, Ltd*., 369 BR 322, 330 (Bankr. S.D. Tex. 2007). In that case, the trustee's complaint alleged that the defendant received fraudulent conveyances which could be recovered under the Texas Uniform

[12] Causes of action filed in an adversary proceeding seeking to recover preferential transfers have been determined to be actions at law to which the right to a jury trial under the Seventh Amendment to the Constitution attaches if the preference defendant has not filed a proof of claim in the bankruptcy case. *See Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989); *Schoenthal v. Irving Trust Co.*, 287 U.S. 92 (1932); and *Black v. Boyd*, 248 F.2d 156 (6th Cir. 1957).

Fraudulent Transfer Act ("TUFTA") through the trustee's strong-arm powers provided by § 544. The defendant's counterclaim sought "enforce[ment of] the liens and equities given her by the TUFTA and the Bankruptcy Code . . . ." *Id.* at 325. The counterclaim also sought an award of costs and attorney fees from the Chapter 7 bankruptcy estate for the defense of the adversary proceeding and the prosecution of the counterclaim. In rejecting the same argument made by the Trustee in this litigation, the court stated:

> If the Defendant is successful on her counterclaims, she would not have a claim against the estate for any pre-petition debt; and an award of attorneys' fees after a successful defense would not invoke the process of allowance or disallowance of pre-petition claims. The Defendant is not a creditor, and no possible result from the counterclaims would make her a creditor. As discussed in *Mirant*, the present action by the Trustee is an attempt to enlarge the value of the bankruptcy estate, but this suit alone does not involve the claims allowance process. If the Defendant succeeds on her counterclaims, and the Trustee loses on the fraudulent transfer claims, the estate will not be enlarged, but it does not follow that there was a claim which was allowed or disallowed. Without needing to reach the issue of whether the counterclaim was permissive or compulsory, this Court is of the view that by filing the counterclaim (1) the Defendant, as a non-creditor, did not invoke this Court's equitable powers to restructure the debtor-creditor relationship; and (2) no possible resolution of the Defendant's counterclaim will involve the allowance or disallowance of a claim. Accordingly, there has not been a waiver of the right to a jury trial.

Id. at 332 (footnote omitted).[13] *See also Mirant Corp v. The Southern Co.*, 337 B.R. 107, 121-22 (N.D. Tex. 2006) (determining legal claims raised by the plaintiffs would not affect the

[13] Although *Roberds v. Palliser Furniture*, 291 B.R. 102 (Bankr. S.D. Ohio 2003) (Rice, C.J.) found a counterclaim for *post-petition* administrative expenses as a set-off to a preference action waived the right to a jury, such a substantive, formal counterclaim is not analogous to a general request for attorney fees in a "wherefore" clause. *But see also Condrey v. Endeavour Highrise L.P. (In re Endeavour Highrise L.P.)*, 425 B.R. 402, 419 (Bankr. S.D. Tex. 2010) ("The suit at bar is distinguishable from *British American Properties* by this very principle—

liability or priority of the defendant's proofs of claim in the bankruptcy and, therefore, the right to a jury was not forfeited).

Goldman has not filed a proof of claim in this Chapter 7 case. Accordingly, the adversary proceeding will not result in the allowance or disallowance of a claim in the bankruptcy case or the adjustment of the debtor-creditor relationship.[14] The subject request for attorney fees contained in the prayer for relief seeks attorney fees as part of an award of costs of the proceeding under Bankruptcy Rule 7054 incorporating Federal Rule of Civil Procedure 54, including Rule 54(d)(2), not for substantive relief as part of a claim which would be required to be pursued as a separate count in the complaint pursuant to Bankruptcy Rule 7008. *Antioch Litig. Trust v. Morgan* (*In re Antioch Co.*), 451 B.R. 810, 816 (Bankr. S.D. Ohio 2011); *Leonard v. Onyx Acceptance Corp.*, 2003 WL 1873283, at *2 (D. Minn. 2003). Under Rule 54(d)(2), a separate motion would need to be filed because a preference action does not award attorney fees to any party at trial as an element of damages, which is the only exception to that rule.[15] *See Leonard* at *2 ("[A] summary, general demand for

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[defendant's] dispute with Endeavour, arose *pre-petition,* whereas the defendant's claim in *British American Properties* arose post-petition).

[14] It is true that in the event that the Trustee prevails and recovers from Goldman on her preference claim, Goldman will be entitled to file a claim in the case to the extent of the funds paid over to the Trustee pursuant to Code § 502(h). *See* footnote 5. Nevertheless, as previously discussed, despite this relationship to the claims process, binding precedent unequivocally establishes that preference claims are actions at law to which the Seventh Amendment jury trial right attaches.

[15] The court does not find the slip opinion in *Badami v. Sears Cattle Co.* (*In re Afy, Inc.*), 2011 Bankr. Lexis 3215 (Bankr. D. Neb. Aug. 18, 2011), cited by the Trustee, apposite. In *Afy* the Chapter 7 trustee filed an adversary proceeding against Sears Cattle Co. and Sears Cattle filed a counterclaim alleging that the trustee misappropriated and converted its real and personal property by liquidating that property and distributing the sale proceeds to other creditors. The court relied on the line of cases holding that counterclaims filed against a bankruptcy trustee are equivalent to proofs of claim filed in the bankruptcy case, turning the proceeding into an action in equity to which a jury trial right does not attach. The counterclaim, therefore, involved questions of property of the estate and a direct claim against the estate for recovery of what Sears Cattle alleged was its property. A Rule 54(d)(2) request for attorney fees is far different than a counterclaim of this nature which

attorneys' fees in the prayer for relief does not constitute a proper *claim* for a grants of attorneys' fees as required by the relevant procedural rules."). Thus, a general demand for attorney fees in a wherefore clause is not the equivalent of pleading a counterclaim that, like the filing of a proof of claim, would waive the right to a jury.

VI. Proposed Conclusion of Law, or in the Alternative, Conclusion of Law: This Court Does Not Have the Authority to Conduct a Jury Trial[16]

A. The Bankruptcy Court Has Not Been Specially Designated by the District Court to Conduct a Jury Trial

Section 157(e) of Title 28 and Bankruptcy Rule 9015 permit bankruptcy courts to conduct jury trials if a timely jury demand has been made, "the bankruptcy judge has been specially designated by the District Court to conduct the jury trial, and the parties have consented to having the jury trial conducted by the bankruptcy judge." In this case Goldman made a timely demand for a jury trial and both parties both have consented to the bankruptcy court's conducting of the jury trial. See docs. 3 & 27. However, as of this time, the bankruptcy court has not been "specially designated" by the District Court to conduct a jury trial in this adversary proceeding or in adversary proceedings in general. In some districts, local rules have been adopted specially designating bankruptcy courts to conduct

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strikes at the very core of what bankruptcy courts do – determine property of the estate and the claims which are entitled to receive distributions from that res.

[16] The court submits its determination as to its authority to conduct a jury trial as a proposed conclusion of law for final determination by the District Court in the event the District Court agrees that the bankruptcy court does not have the authority to render a final judgment in this proceeding. However, in the event the District Court determines this court does have authority to enter final orders and judgment in this proceeding, this determination shall constitute the bankruptcy court's conclusion of law.

jury trials.[17] However, there is no such rule in the Southern District of Ohio. Accordingly, absent the District Court's "specially designating" the bankruptcy court to conduct the jury trial for this adversary proceeding on an ad hoc basis, this court cannot conduct the jury trial demanded by Goldman.

B. This Court May Not Have the Constitutional Authority to Conduct a Jury Trial Even With the Parties' Consent and a Special Designation by the District Court

Setting aside this court not having been specially designated by the District Court to conduct a jury trial, a significant constitutional issue exists with respect to whether under these facts the bankruptcy court can conduct a jury trial. It does not appear that this issue has been raised by the parties nor resolved by the federal courts. However, the Supreme Court raised the issue in *Granfinanciera* without answering that question:

> We do not decide today whether the current jury trial provision . . . permits bankruptcy courts to conduct jury trials in fraudulent conveyance actions like the one respondent initiated. Nor do we express any view as to whether the Seventh Amendment or Article III allows jury trials in such actions to be held before non-Article III bankruptcy judges subject to the oversight provided by the district courts pursuant to the 1984 Amendments. We leave those issues for future decisions.

Granfinanciera, 492 U.S. at 64 (citations and footnote omitted).

Other than the Second Circuit in a pre-*Stern* decision, the circuit courts have not directly addressed the constitutional issue. Prior to *Stern,* the Second Circuit held that bankruptcy courts both may conduct jury trials and that doing so does not violate Article III.

[17] For instance, see Northern District of Ohio Local Bankruptcy Rule 9015-1(a) which provides that "[t]he bankruptcy judges of the Northern District of Ohio are specially designated to conduct jury trials pursuant to 28 U.S.C. § 157(e)."

See Ben Cooper, Inc. v. The Ins. Co. of the State of Penn. (*In re Ben Cooper, Inc.*), 896 F.2d 1394 (2nd Cir. 1990), *vacated and remanded*, 111 S. Ct. 425 (1990), *previous judgment reinstated*, 924 F.2d 36 (2d Cir. 1991), *cert. denied*, 111 S. Ct. 2041 (1991). However, that determination was made on the premise that bankruptcy judges' authority to enter final judgments in core proceedings does not violated Article III, a premise which we now know from *Stern* is not completely correct. *Ben Cooper*, 896 F.2d 1403. In *Rafoth v. National Union Fire Ins. Co.* (*In re Baker & Getty Fin. Servs., Inc.*), 954 F.2d 1169 (6th Cir. 1992) the Sixth Circuit found that under the then existing statutory and rule framework, bankruptcy judges were not authorized to conduct jury trials. The court specifically noted that it was not addressing "whether such an authorization would violate Article III of and the Seventh Amendment to the United States Constitution." *Id.* at 1172 n. 10. Similarly, in quoting *Gomez v. United States*, 490 U.S. 858, 864, in *United Missouri Bank, N.A.*, 901 F.2d 1449 (8th Cir. 1990) and *In re Grabill*, 967 F.2d 1152, 1157 (7th Cir. 1992) the courts found no such statutory authority at the time for bankruptcy courts to conduct a jury trial, but had no need to address the constitutional question. However, the Bankruptcy Reform Act of 1994 added § 157(e) and Bankruptcy Rule 9015(b) was added to authorize bankruptcy judges to conduct jury trials under the conditions set forth in those provisions, eliminating the statutory and rule authorization issue as an impediment to bankruptcy courts conducting jury trials. However, since the parties cannot consent to this court entering final judgment for "traditional actions at common law," it is unclear whether § 157(e) could be constitutionally applied.

This court need not draw a conclusion as to whether it has the constitutional authority to conduct a jury trial, but instead raises this issue for consideration by the District Court in determining future adjudication of this proceeding.

VII. Conclusion

For the reasons discussed in this Report, the court determines that it does not have the constitutional authority to enter final orders or judgment in this proceeding and, therefore, submits this Report to the District Court with proposed conclusions of law as to the jury trial issues. Any objections to the proposed findings of fact or conclusions of law contained within this Report shall be filed and served in accordance with Bankruptcy Rule 9033(b). In the event the District Court returns this proceeding to this court, the court will proceed with the adjudication of this proceeding as may be appropriate based upon the determinations of the District Court.

Copies to:

Ruth Slone, PO Box 3340, Dayton, Ohio 45401-3340 (Trustee)

Lee A. Slone, PO Box 3340, Dayton, Ohio 45401-3340
(Counsel for the Plaintiff Trustee)

Harry B. Zornow, 860 NW Washington Blvd, Hamilton, Ohio 45013
(Counsel for the Plaintiff Trustee)

John Paul Rieser, 7925 Graceland Street, Dayton, Ohio 45459
(Counsel for the Defendant, Nancy Goldman)

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